CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 111

HOMER C. PRICE, PETITIONER,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 4, 1947.

CERTIORARI GRANTED JUNE 23, 1947.

No. 11334

United States
Circuit Court of Appeals
For the Ninth Circuit

HOMER C. PRICE,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 7-31-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HOMER C. PRICE,
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California,
In Propria Personam.

FRANK J. HENNESSY,
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Attorneys for Appellee.

On Appeal from United States District Court, Northern District of California, Southern Division.

Decision by Hon. Michael J. Roche.

In the Southern Division of the United States District Court for the Northern District of California.

No. 25537-R

In the Matter of the Application of

HOMER C. PRICE,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

In re: Application for leave to file Petition for Writ of Habeas Corpus, and Proceed in Forma Pauperis.

Comes now Homer C. Price, petitioner in the within matter and states that he is a citizen of the United States by birth and is of legal age:

That he is in the custody of the United States and is being confined in the United States Penitentiary on the Island of Alcatraz, California, and within the jurisdiction of this Honorable Court:

That he is the petitioner in the above-entitled application for writ of habeas corpus and that he is entitled to commence and maintain the same.

That the petitioner-affiant believes himself entitled to the redress sought to be obtained by said application, that the [1*] nature of said application is the determination of the scope and extent of affiant's

* Page numbering appearing at foot of page of original certified Transcript of Record.

right to be secure from being placed upon trial for a crime not charged in the indictment; and to be secure in not having a witness subpoenaed to prove a collateral crime unrelated to the crime charged; and be secure in not having a collateral crime, that has never been charged against affiant, proved and submitted to the jury for their consideration; and to be secure in having the indictment charge the offense by "conjunctive," and not by "disjunctive," and to be secure in having the jury find the guilt, or not guilty, upon separate and distinct offenses; and to be secure in having each indictment, charge only one crime; and to be secure in having a fair and impartial trial, and due process of law; that affiant is without funds and unable to pay the costs of said application or petition on to give security for the same; that there is no person interested by contract or otherwise in said application or entitled to share in any relief thereunder who is able to pay or secure said costs; that this application and affidavit is made for the purpose of availing affiant of the rights and privileges in such case provided by Section 832 of title 28 U.S.C., Sec. 832.

Wherefore, affiant prays that he may have leave to prosecute said Petition for write of habeas corpus in forma pauperis without costs of fee pursuant to said Statute, supra. [2]

Respectfully submitted,

/s/ HOMER C. PRICE,
Petitioner.

State of California,
County of San Francisco—ss.

Homer C. Price, being first duly sworn, deposes and says:

That he is the petitioner in the within action; that he has read the within application for leave to file petition and proceed in forma pauperis, and knows the contents thereof; that the statements made herein are true of his own knowledge.

/s/ HOMER C. PRICE,
Affiant.

....., Register Number 459 AZ, has on deposit in the Prisoners' Trust Fund, the sum of $2.39.

Subscribed and sworn to before me this 2nd day of January, 1946.

[Seal] /s/ E. J. MILLER,

Associate Warden, United States Penitentiary, Alcatraz, California.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Homer C. Price is a citizen of the United States.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Title of District Court and Cause.]

PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court, Northern District of California:

The Petition of Homer C. Price respectfully shows:

1. That he is now imprisoned and restrained of his liberty by James A. Johnston, Warden, in United States Penitentiary, Alcatraz, California.

2. That the cause or pretense of such imprisonment and restraint, according to the best knowledge and belief of your petitioner, is the indictment, judgment, verdict, copies of which are hereto annexed.

3. That said imprisonment and restraint are illegal and their illegality consists in the following, among other things, to-wit:

4. That petitioner was convicted by a general verdict of the jury, upon an indictment drawn in four counts, the first count charges two separate and distinct offenses. (P. 7) the first count charges the offense of "entering the bank with intent to commit a felony, * * *, the second offense charged in the same count being a separate and distinct offense, to wit: "and steal the money therein, the sum of $3,829.06."

5. The fourth count of the indictment charges the offense of: "entering the bank with intent to commit a felony," * * *, the second, third, and

fourth offenses charged in this same count, [4] are three aggravating circumstances charging a single offense; but are a separate and distinct offense from that of the first offense: (P. 8-9).

6. The court confused the jury as to the actual basis of the indictment, by giving the impression that the defendant was indicted for the crime of perjury, before a Notary Public of the State of Michigan at Lansing, Michigan, and subpoenaed the Notary and inquired into the collateral crime, unconnected with the crime charged. See exhibit (a), and submitted it to the jury for a finding, as claimed by the evidence presented by the government; denying defendant the right to be informed of the nature and cause of the accusation; and a change in the indictment by the court; see exhibit (E).

7. That the court invaded the province of the jury, by itself determining upon what clause of the Statute the general verdict rested.

8. That the fourth count of the indictment does not charge a crime, and the court did not have jurisdiction as there could not be any evidence submitted to prove the crime as follows: in that the clause of the statute defining the offense of forcing a person to accompany them; is in the disjunctive and the pleader has not connected the offense by the conjunctive, therefore is void.

9. That the court upon a general verdict of the jury, upon [5] multiple counts of the indictment

charging separate and distinct offenses; passed a general Sentence (P. 10-11), the first count of the indictment charging two separate and distinct offenses (P. 7); the fourth count charges two separate and distinct offenses, and three aggravating circumstances, charging a single offense. (P. 8-9).

16. That for the above causes, petitioner has been denied a fair and impartial trial, and denied due process of law.

Wherefore your petitioner prays that a writ of habeas corpus issue, directed to the said James A. Johnston, commanding him to have the body of Homer C. Price, together with the cause of such imprisonment and restraint, forthwith before the court or officer granting said writ.

Respectfully submitted,

HOMER C. PRICE,
Petitioner Propria Persona,
459-AZ, Alcatraz, California.

Dated January 2, 1946.

United States of America,
Northern District of California—ss.

Homer C. Price, being duly sworn, deposes and says:

That he has drafted the foregoing application and knows the contents thereof, and that the same is in all respects true.

Sworn to before me this 2nd day of January, 1946. [6]

[Seal] /s/ E. J. MILLER,

Associate Warden, United States Penitentiary Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths. [7]

EXHIBIT A

DIRECT EXAMINATION OF THE WITNESS, WILLIAM H. BECK TAKEN ON APRIL 26, 1938.

Direct Examination

By Mr. Babcock:

Q. Where do you live, Mr. Beck?

A. 1120 Jerome Street, Lansing, Michigan.

Q. Are you in business in Lansing?

A. I am.

Q. What is your business?

A. I have a sporting goods store.

Q. I will show you a document marked Exhibit 15, and ask you to examine it, and see if you can tell me if you recognize any names on there?

A. I do.

Q. Whose name?

A. Homer C. Price, and my own.

Q. In what capacity is your own name on there?

A. As a Notary.

Q. Are you a Notary Public? A. I am.

Q. Commissioned by the Governor of the State of Michigan? A. I am.

Q. And were you such on the 10th of November, 1937? A. I was.

Q. Whether or not you acted in that capacity in connection with exhibit 15? [8] A. I did.

Q. At that time, what was the condition of that document, exhibit 15, as to whether or not the blanks were filled in or not?

A. The blank was all filled, excepting the signature of Homer C. Price and my own.

Q. And when was the signature of Homer C. Price put on there?

A. On the 10th day of November, 1937.

Q. In your presence? A. It was.

Q. And what did you say to Homer C. Price at that time?

A. I asked him to sign the document, and then administered the oath.

Q. In administering the oath, what did you say to him?

A. Asked him to raise his right hand and swear that the affidavit that he had signed was the truth, the whole truth and nothing but the truth, "So help me God."

Mr. Babcock: You may cross-examine. [9]

EXHIBIT B

Vio: Title 12, Sec. 588 B (a), (b) and Sec. 588c U.S.C. Banking Act of 1935.

United States of America
In the District Court of the United States
For the Eastern District of Michigan
Southern Division

Eastern District of Michigan,
Southern Division—ss.

The Grand Jurors of the United States of America, empanelled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court,

Homer C. Price
and
John Simunov, alias
John Szekeres, alias
John Simuno, alias
John Czekeres, alias
John Ray, alias
John Simino, alias
John Semuny, alias
John Czekerec,

said Homer C. Price being late of the City of Lansing, Michigan, and hereinafter referred to as defendants, did, enter a bank, to-wit: The Metamora

State Savings Bank, a bank in the village of Metamora, Michigan, with intent to commit in such bank a felony or larceny, to-wit: to take, rob, and steal the money therein in the care, custody, control, management, and possession [10] of said bank, and belonging to said bank, said money being, to-wit: In the sum of $3,829.06, and said bank being an insured bank in the Federal Deposit Insurance Corporation; contrary to form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

SECOND COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendant Homer C. Price, late of the City of Lansing, Michigan, and the said defendant John Simunov, alias, John Szekeres, alias John Simuno, alias John Czekerec, late of the County of Wayne and State of Michigan, on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, by force and violence, and by putting in fear, unlawfully willfully, knowingly, and feloniously, rob, steal, and take from the presence of Fred T. Donner, an officer and employee of the Metamora State Savings Bank, a banking corporation organized and doing business under the laws of the State of Michigan, and an insured bank in the Federal Deposit Insurance Corporation, certain monies, to-wit: the sum

of $3,829.06, lawful money of the United States of America, the exact denominations of the certificates, currency and coin comprising the sum aforesaid being to these Grand Jurors unknown, which said sum of money, at the time *time* it [11] was so robbed, stolen and taken by the defendants as aforesaid, belonged to and was in the care, custody, control, management and possession of a certain bank, to-wit: The Metamora State Savings Bank, an insured bank in the Federal Deposit Insurance Corporation; contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendant Homer C. Price, late of the City of Lansing, Michigan, and the said defendant John Simunov, alias John Szekeres, alias John Simuno, alias John Czekeres, alias John Ray, alias John Simino, alias John Semuny, alias John Czekerec, late of the County of Wayne, State of Michigan, on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the Second Count hereof, to-wit: by force and violence, and by putting in fear, unlawfully, willfully, knowingly, and feloniously rob, steal and take from the presence of Fred T. Donner, money in the care, custody, con-

trol, management and possession of the Metamora State Savings Bank, an insured bank in the Federal Deposit Insurance Corporation, assault, and put in jeopardy the life of Fred T. Donner, and other persons [12] to these Grand Jurors unknown, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

FOURTH COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendant Homer C. Price, late of the City of Lansing, Michigan, and the said defendant John Simunov, alias John Szekeres, alias John Simuno, alias John Czekeres, alias John Ray, alias John Simino, alias John Semuny, alias John Czekerec, late of the County of Wayne, State of Michigan, on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing the offenses hereinbefore described in the First, Second and Third Counts hereof, to-wit: (a) entering the Metamora State Savings Bank, an insured bank in the Federal Deposit Insurance Corporation, with intent to commit a felony or larceny therein; (b) robbing, stealing and taking from the presence of Fred T. Donner money in the care, custody, control, management and possession of the Metamora State Savings

Bank, an insured bank in the Federal Deposit Insurance Corporation; and (c) while committing the offenses immediately hereinbefore described, assaulting, and putting in jeopardy the life of Fred T. Donner, by the use of dangerous weapons; or in avoiding or attempting to avoid [13] apprehension for the commission of such offenses, force a person, to-wit: Fred T. Donner, to accompany them without the consent of said Fred T. Donner; contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

JOHN C. LEHR,
United States Attorney.

JOHN W. BABCOCK,
Assistant U. S. Attorney,
Eastern District of Michigan.

A true bill:

LOUIS M. CARLETON,
Foreman.

[Endorsed]: Filed Feb. 15, 1938. [14]

EXHIBIT C

VERDICT

April 29, 1938.

At a Session of the District Court of the United States for the Eastern District of Michigan, con-

tinued and held pursuant to adjournment at the District Court Room, in the City of Detroit, in said District, on Friday the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable Edward J. Moinet, United States District Judge;

The Honorable Ernest A. O'Brien, United States District Judge, and

The Honorable Arthur F. Lederle, United States District Judge.

April 29, 1938.

UNITED STATES OF AMERICA,

vs.

HOMER C. PRICE and JOHN SIMUNOV, alias JOHN SZEKERES, alias JOHN SIMUNO, alias JOHN CZEKERES, alias JOHN RAY, alias JOHN SIMINO, alias JOHN SEMUNY, alias JOHN CZEKEREC.

INDICTMENT FOR VIOLATION TITLE 12, SEC. 588 B (a) (b) AND SEC. 588C U.S.C. BANKING ACT OF 1935

In this cause the jurors heretofore empaneled and sworn come into Court again and sit together and the Judge in open court, opens the sealed verdict of the jurors heretofore returned, which sealed verdict is by the Court read aloud and discloses that the jury finds that the defendants Homer C.

Price and John Simunov, alias John Szekeres, alias John Simuno, alias John Czekeres, alias John Ray, alias John Simino, alias John Semuny, alias John Czekerec, guilty of the charges in said indictment contained.

Thereupon it is ordered that sentence of said defendants be deferred without date, and said defendants remanded to the custody of the United States Marshal, to await sentence.

EDWARD J. MOINET,
U. S. District Judge.

SENTENCE

At a Session of the United States District Court for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room in the City of Detroit in said District on Saturday, the fourteenth day of May, A.D. 1938.

Present:

The Honorable Edward J. Moinet, United States District Judge. [16]

[Title of Cause.]

Indictment for Vio: Title 12, Sec. 588 B (a), (b), and Sec. 588 C. U.S.C. Banking Act of 1935. (Unlawfully entering a Bank with intent to rob; Robbing a Bank; Putting in jeopardy the life of a person with the use of dangerous weapons, and Kidnapping).

The defendant Homer C. Price, being present in Court and having heretofore been found guilty of

the charges in said indictment contained and now being placed at the Bar of the Court for sentence, and duly inquired of by the Court what he had to say why sentence should not be imposed upon him, and the Court having fully heard and considered all that said defendant had to say in that behalf, thereupon the Court does now sentence the said defendant, Homer C. Price to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term of and period of sixty-five (65) years at hard labor, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention; to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention, for violation of Title 12, Sec. 588 B (a), (b) and Sec. 588 C U.S.C. Banking Act of 1935.

/s/ EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.

By JOHN W. BABCOCK,
Asst. U. S. Attorney.

[Endorsed]: Filed May 14, 1938. [18]

EXHIBIT E

[Title of District Court and Cause.]

Hearing before Honorable Edward J. Moinet, District Judge, and a jury, commencing on April 19, 1938, charge of the court.

Now, briefly, and to aid you somewhat in your deliberations, so that you may see the issues that are here for your determination, some testimony has been given here as to the evidence of Price, in reference to his application for a permit to carry a pistol.

The government claims in that respect, that in his application, he swore falsely.

The government claims that its testimony shows that Price presented this application to this Notary in Lansing, and he was a notary and he administered the oath.

If you find that Price sworn to that knowingly, then that would be swearing to something that is not true.

(By the) ASSOCIATED COURT REPORTERS,
1358-1362 National Bank Bldg., Detroit, Michigan.

[Endorsed]: Filed Jan. 7, 1946. [19]

District Court of the United States
Northern District of California

No. 25537-R

HOMER C. PRICE,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 21st day of January, 1946, at the hour of 10 o'clock a.m., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated January 8th, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Jan. 8, 1946. [20]

[Title of District Court and Cause.]

AMENDMENT TO THE APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner and amends his application for writ of habeas corpus by inserting the following paragraph on page 4 of said application, marked as paragraph 10:

10. That the government knowingly employed false testimony on the trial, to obtain the conviction.

HOMER C. PRICE,
Petitioner Propria Persona.

Dated January 14, 1946.

[Endorsed]: Filed Jan. 15, 1946. [21]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now James A. Johnston, Warden of the United States Penitentiary at Alcatraz Island, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the prisoner," on whose behalf the petition for writ of habeas corpus was filed, is detained by respondent James A. Johnston, as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence of the District

Court of the United States for the Western District of Michigan, Southern Division, in case number 24629, made and entered on May 14, 1938, and transfer order issued at Washington, D.C., on July 2, 1938, signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice, ordering the transfer of the petitioner from the Penitentiary at Leavenworth, Kansas, to the United States Penitentiary at Alcatraz Island, California;

II.

That this is the fourth petition for writ of habeas corpus filed by the petitioner herein, a prior petition in [22] case number 23268-W, a prior petition in case number 23721-R and a prior petition in case number 25040-S having been denied by this Court;

III.

That the entire record in said case number 23268-W, the entire record in said case number 23721-R and the entire record in said case number 25040-S are hereby referred to and incorporated herein as though set forth in full.

Wherefore respondent prays that this petition for writ of habeas corpus be denied.

Dated January 21, 1946.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES

This is the fourth petition for writ of habeas corpus filed by the petitioner herein.

In denying petitioner's application for writ of habeas corpus in case number 25040-S, his Honor, United States District Judge A. F. St. Sure on August 22, 1945, filed the following memorandum and order:

"Petitioner seeks his release from Alcatraz Penitentiary on this third petition for write of habeas corpus. The first, No. 23268-W, was heard and denied on January 14, 1941, by Judge Martin I. Welsh. On appeal, with the entire record of the matter before it, and after lengthy discussion, the Judgment of the District Court was affirmed. Price v. Johnston, 125 F. (2d) 806. Certiorari was denied by the United States Supreme Court, 316 U.S. 677. The Second petition, No. 23721-R, was heard by Judge Michael J. Roche, petitioner being present in court, and was denied by Judge Roche on September 8, 1943. On appeal the order of the District Court was affirmed. Price v. Johnston, 144 F. (2d) 260.

Petitioner alleges 'that the questions now raised was not raised in the prior petitions No. 23268-W and 10671-R.' However, these matters were known to petitioner when he filed the petitions in 23268-W and 23721-R. If petitioner intended to rely on these matters he should have urged them in 23268-W. 'To reserve them for use in a later proceeding

"was to make abusive use of the write of habeas corpus".' Swihart v. Johnston, United States Circuit Court of Appeals for the Ninth Circuit, decided August 6, 1945.

Since upon the face of the petition petitioner is not entitled to the writ, Walker v. Johnston, 312 U.S. 275, 284, it is therefore [24]

Ordered the petition for writ of habeas corpus is hereby denied.

Dated August 22, 1945."

Judge St. Sure likewise entered an order on November 23, 1945, denying permission to petitioner to appeal in forma pauperis.

Respondent, in reliance on the decision of Judge St. Sure and the authorities which he cites, respectfully urges that the petition for writ of habeas corpus should be denied and the order to show cause, heretofore issued, discharged.

[Endorsed]: Filed Jan. 21, 1946. [25]

District Court of the United States, Northern District of California, Southern Division

No. 25537-R Civil

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room

thereof, in the City and County of San Francisco, on Monday, the 21st day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Michael J. Roche, District Judge.

Homer C. Price

vs.

James A. Johnston, Warden, Etc.

This case came on regularly this day for hearing on the order to show cause. On motion of Daniel Deasy, Esq., Assistant U. S. Attorney, it is Ordered that the petitioner may have two weeks to file a traverse to the respondent's return to the order to show cause, and that said matter be continued to February 4, 1946, for further hearing. [26]

[Title of District Court and Cause.]

TRAVERSE TO RESPONDENT'S ANSWER TO AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS:

Comes now Homer C. Price, petitioner in the within matter, and for his traverse to respondent's answer to amended application for writ of habeas corpus respectfully shows:

1.

That the person hereinafter called "the Respond-

ent," on whose behalf the "Return To Order To Show Cause" was filed, concedes the facts upon which the petitioner is being detained, by virtue of the judgment and sentence of the District Court of the United States for the Eastern District of Michigan in Case No. 24629, made and entered on May 14, 1938.

2.

That this is the fourth petition for writ of habeas corpus filed by the petitioner herein; a prior petition in Case No. 23268-W did not contain these questions; a prior petition in Case No. 23721-R did not contain these questions; and a prior petition in Case No. 25040-S did not contain some of these points, but the writ was denied—not upon the merits of the questions raised, but upon the abuse of the Writ of Habeas Corpus Statute by a subsequent petition.

3.

The Respondent in paragraph 3, P. 2, line 13, incorporates the entire record in the three prior petitions into the present petition, which is nothing more than an effort to prejudice [27] the petitioner by incorporating matters which have no application to the questions involved and should be stricken out.

4.

That petitioner was in fact tried and convicted upon separate and distinct offenses, consolidated for trial, by a general verdict of the Jury, without specifying upon which clause of the Statute the general verdict rested, and there being a crime charged in the crime involved.

5.

That the petitioner was in fact tried and convicted of a common law crime by a change of the indictment of the court, and therefore not informing the petitioner of the nature and cause of the accusation.

6.

That the trial court did in fact invade the province of the Jury, by itself determining upon what clause of the Statute the general verdict rested for the purpose of sentence.

7.

That the trial court did in fact pass a general sentence, upon a general verdict of the Jury, upon multiple counts of the indictment, charging separate and distinct offenses, and the common law crime charged.

8.

That petitioner did not in fact have a fair and impartial trial before the trial court, and in fact was denied due process of law. [28]

Petitioner incorporates herein each and every allegation made by him in his application and amended application for writ of habeas corpus.

Wherefore, petitioner prays that a writ of habeas corpus issue and that the Respondent be ordered to produce the body of petitioner before this Honorable Court, in order that he may prove his allega-

tions and points and be discharged from custody, as law and justice require.

Dated: January 29, 1946.

HOMER C. PRICE,
Petitioner in Propria Persona.

State of California,
City and County of San Francisco—ss.

Homer C. Price, being first duly sworn, deposes and says:

That he is the petitioner in the within action; that he has read the within traverse to answer to amended application for writ of habeas corpus and knows the contents thereof;

That the statements made herein are true of his own knowledge.

HOMER C. PRICE,
Petitioner in Propria Persona.

Subscribed and sworn to before me this 29th day of January, 1946.

[Seal] /s/ E. J. MILLER,
Associate Warden, United States Penitentiary, Alcatraz, California.

Records at U.S. Penitentiary, Alcatraz, California, indicate that Homer C. Price is a citizen of the United States.

Warden-Asociate Warden authorized by the Act of February 11, 1938, to administer oaths. [29]

MEMORANDUM OF POINTS AND AUTHORITIES

The Respondent, in his memorandum of authorities, strongly relies upon the decision of the Honorable Judge St. Sure in Case No. 25040-S to have this petition denied, as being an abuse of the use of Habeas Corpus Statute, by filing subsequent petition for a writ of habeas Corpus, on points that have never been raised, as well as points that have been raised but not decided. The decision so relied upon is as follows, to-wit:

"Petitioner alleges that the questions now raised were not raised in the prior petitions Nos: 23268-W and 10671-R. However, these matters were known to petitioner when he filed the petitions in 23268-W and 23721-R. If petitioner intended to rely on these matters, he should have urged them in 23268-W. To reserve them for use in a later proceeding 'was to make abusive use of the writ of habeas corpus,' Swihart v. Johnston, United States Circuit Court of Appeals for the Ninth Circuit, decided August 6, 1945. Since upon the face of the petition, petitioner is not entitled to the writ, Walker v. Johnston, 312 U.S. 275, 284, it is therefore ordered:

The Petition for Writ of Habeas Corpus is hereby denied.

Dated August 22, 1945."

It is to be noted that the sworn officer of the Court, to see that justice be done, is trying to mislead this Honorable Court as to the law of pro-

cedure in habeas corpus cases by citing the above decision, when, in fact, said District Attorney knows that the above decision is not the law of procedure in habeas corpus cases, and in this Circuit especially, it is to be noted that said Respondent, in his [30] memorandum of points and authorities, did not mention or cite the case that corrects the above ruling of the Honorable Judge St. Sure in denying the petition in 25040-S:

Petitioner in reliance on the decision of U.S. v. Hecht, 48 F. 2d 90; and U.S. v. Mathies, 12 F. 2d 787; Ex Parte Kaine, 14 F. Cas. No. 7597; U.S. v. Matolow, 10 F. 2d 657; and the recent decision in the United States Circuit Court of Appeals for the Ninth Circuit as follows:

Keer v. Squire, 151 F. 2d 308; December 3, 1945: P-310. However, disposition of this present position is a clear illustration of the value of the doctrine that in habeas corpus proceedings the adjudication of a prior petition for release from imprisonment for the same crime, does not make res judicata any matter there decided, much less make adjudicated all the rights to release which could have been, but were not, presented in that prior petition. Waley v. Johnston, 316 U.S. 101, 105, 62 S. Ct. 964, 46 L. Ed. 1302.

Petitioner respectfully urges that the petition for writ of habeas corpus should be issued, and an order to Respondent issued to produce the petitioner in court, in order that he may prove the allegations

set forth in the petition, and amended petition, as law and justice require, and that the petitioner then be discharged.

Dated: January 29, 1946.

Respectfully submitted,

HOMER C. PRICE,
Petitioner in Propria Persona.

[Endorsed]: Filed Jan. 31, 1946. [31]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT

It Is Ordered that the petition for writ of habeas corpus herein filed be and the same is hereby Denied and the order to show cause heretofore issued be, and the same is hereby discharged.

Dated: February 25, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Feb. 25, 1946. [32]

[Title of District Court and Cause.]

AFFIDAVIT FOR LEAVE TO FILE NOTICE OF APPEAL AND PROCEED IN FORMA PAUPERIS:

United States of America,
State of California,
County of San Francisco—ss.

To the Honorable District Judge Michael J. Roche of the United States District Court for the Northern District of California.

Comes now the appellant Homer C. Price, and being first duly sworn, deposes and says:

That he is in the custody of the above-named appellee, and is being confined in the United States Penitentiary at Alcatraz, California.

That he is the appellant in the foregoing Petition for leave to proceed on appeal in forma pauperis, from the order denying petition for writ of habeas corpus, No. 25,537-R filed Feb. 25, 1946.

That appellant believes himself entitled to the redress sought to be obtained by said petition, that the nature of said petition and appeal, is the determination of the scope and extent of appellant's right, to have a review in the Circuit Court of Appeals, of the order denying the petition for writ of habeas corpus, on the following allegations, to-wit: [33]

1. That the trial court consolidated separate and distinct offenses, in one indictment, and the court by implication read into the indictment one additional crime, and submitted all to the jury in the

charge of the court, and the verdict of the jury, was a general verdict, which is void:

2. That the trial court amended the indictment by implication to include the crime of perjury, subpoenaed a witness to prove the collateral crime, and submitted it to the jury, along with the crimes layed in the indictment, "a change of the indictment, by the court, deprives the court of the power of proceeding to try the accused."

3. Where verdict of jury is general so that a reviewing court cannot determine that it did not rest on an invalid constitutional ground on which the case was submitted to the jury, the conviction cannot be sustained, as it is in violation of the constitution.

4. That the trial court passed a general sentence, upon multiple counts of an indictment, and the collateral crime, included by the court, which are separate and distinct offenses, and the court has invaded the province of the jury by its self determining upon what clause of the statute, or crimes the general verdict rested;

5. That the government knowingly employed false testimony on the trial, to obtain the conviction. [34]

6. That the government takes the view that the prior judgments, as to matters which were adjudged in these cases, or which could have been adjudged in those cases; or which could have been adjudged "if raised" are Res Judicata in a subsequent Petition for the writ of habeas corpus;

That appellant is without funds and unable to pay the costs of said appeal, or to give security for same: that there is no person interested by contract or otherwise in said Petition, and appeal, who is able to secure the costs.

That this Petition and affidavit, is made for the purpose of availing appellant of the rights and privileges in such case provided by U.S.C.A. Title 28, section 832:

Wherefore: appellant prays that he may have leave to prosecute said Petition and appeal in forma pauperis without costs or fee pursuant to said statute.

Dated: March 23, 1946.

Respectfully submitted,

HOMER C. PRICE,
Appellant Propria Persona.

Subscribed and sworn to before me this 23rd day of March, 1946.

[Seal] E. J. MILLER,
Associate Warden, United States Penitentiary,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Homer C. Price is a citizen of the United States.

[Endorsed]: Filed Mar. 28, 1946. [35]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It is hereby Ordered that Homer C. Price be and he is hereby allowed to appeal to the United States Circuit Court of Appeals for the Ninth Circuit in Forma Pauperis.

March 28th, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Mar. 28, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Homer C. Price, appellant above named, hereby appeals to the circuit court of appeals for the ninth judicial circuit, from the order denying appellants Petition for a writ of habeas corpus, discharging the order to show cause, theretofore made in said proceedings on the 25th day of February, 1946:

Dated by appellant.

March 23, 1946.

HOMER C. PRICE,
Appellant Propria Persona,
P.M.B. 459,
Alcatraz, California.

[Endorsed]: Filed Mar. 28, 1946.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above entitled court:

You are hereby requested to prepare a record to be filed in the ninth judicial circuit court of appeals, pursuant to an appeal in the above entitled cause, and to include in such record the following and no other papers and exhibits to wit:

1. Affidavit forma pauperis, dated Jan 2, 1946;

2. Application for Writ of habeas corpus, dated Jan. 2, 1946;

3. Amendment to the application, dated Jan. 14, 1946;

4. Exhibit (a);

5. Exhibit (b);

6. Exhibit (C);

7. Exhibit (D);

8. Exhibit (E);

9. Order to Show cause, dated Jan. 8, 1946;

10. Return to order to show cause, and memorandum of Points and authorities, dated Jan 21, 1946;

11. Order allowing two weeks to file a traverse, dated Jan. 22, 1946;

12. Traverse, dated Jan. 29, 1946; Memorandum of Points and Authorities;

13. Order denying Petition for Writ, dated Feb. 25, 1946;

14. Affidavit for leave to proceed on appeal in forma pauperis, dated March 23, 1946; [38]

15. Notice of appeal, dated March 23, 1946;

16. Statement of Points on appeal, dated March 23, 1946;

17. This designation of record, dated March 23, 1946;

Said record to be prepared pursuant to rule 75 (a) (d) (G) Rules of civil procedure, and is to be filed in the office of the Clerk of said circuit court of appeals for the Ninth Circuit on or before the 2nd day of May, 1946.

Dated this 23rd day of March, 1946, by appellant.

Respectfully submitted,

HOMER C. PRICE,
Appellant Propria Persona,
PMB 459,
Alcatraz, Calif.

[Endorsed]: Filed Mar. 28, 1946.

[Title of District Court and Cause.]

STATEMENT OF POINTS THAT APPELLANT INTENDS TO RELY ON THE APPEAL

Comes now the appellant Homer C. Price, and makes his concise Statement of Points on which he intends to rely on the appeal, as follows:

1.

Where a defendant is charged in the indictment with three Separate and distinct offenses, Set out in Separate counts; and, two Separate and distinct offenses Set out in one count; and, by implication, the court include on additional Separate and distinct offense, the crime of perjury, without a formal indictment, all consolidated in one trial, and, a general verdict of guilty, without specifying upon which offense the general Verdict rested, "is a Void Verdict," and the court should *of* granted the Writ, and allowed the defendant the right to present his evidence to prove the allegations:

2.

That the trial court amended the indictment by implication, to include the collateral crime of perjury, and subpoenaed a witness to prove the collateral crime, and submitted it to the jury, along with the crimes layed in the indictment, "a change of the indictment by the court, deprives the court of the power of proceeding to try the accused," and, the court below should *of* [40] granted this writ,

and allowed the defendant the right to present evidence, to prove the allegations:

3.

Where Verdict of jury is general so that a reviewing court cannot determine that it did not rest on an invalid constitutional ground on which the case was submitted to the jury, the conviction cannot be sustained; and the court below should *of* granted the writ, and allowed the defendant the right to present his evidence to prove the allegations:

4.

That the trial court in passing a general sentence, did invade the province of the jury by its self determining upon what clause of the statute, or crimes, the general verdict rested: and the court below should *of* granted the writ, and allowed the defendant the right to present his evidence to prove the allegations:

5.

That the government knowingly employed false testimony on the trial, to obtain the conviction: and the court below should *of* granted the writ, and allowed the defendant the right to present his evidence to prove the allegations:

6.

The government takes the view that the prior judgments, as to matters which were adjudged in those cases, or which could have been adjudged "if raised" are Res Judicata in a subsequent Petition for writ of habeas corpus, and by the denial of

the [41] Petition upon the return, and traverse, on this ground, "was erroneous."

Respectfully submitted,

HOMER C. PRICE,
Appellant Propria Persona,
P.M.B. 459,
Alcatraz, California.

Dated: March 23, 1946.

[Endorsed]: Filed Mar. 28, 1946. [42]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including June 15, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 7, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed May 7, 1946. [43]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing

pages, numbered from 1 to 43, inclusive, contain a true, full and correct transcript of the records and proceeding in the case entitled: Homer C. Price, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, Cal., No. 25537-R, Respondent, as the same now remain on file and of record in my office.

I Further Certify that the cost of the foregoing transcript is $17.20 and that said amount has not been paid by appellant for the reason that he is proceeding in forma pauperis.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said District Court at San Francisco this 24th day of May, A. D., 1946.

C. W. CALBREATH,
Clerk.

By E. H. NORMAN,
Deputy Clerk. [44]

[Endorsed]: No. 11334. United States Circuit Court of Appeals for the Ninth Circuit. Homer C. Price, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: May 24, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

No. 11334

HOMER C. PRICE,

vs.

JAMES A. JOHNSTON, Warden U. S. Penitentiary, Alcatraz, California

Before Denman, Healy and Bone, Circuit Judges

ORDER CONTINUING CAUSE FOR HEARING, AND REQUIRING APPELLEE TO PRODUCE APPELLANT—August 20, 1946

This cause coming on regularly for hearing, there being no one present in open court on behalf of appellant, and Mr. Joseph Karesh, Assistant United States Attorney, appearing for the appellee, and good cause therefor appearing.

It Is Ordered that the hearing of the above-entitled cause be continued to Friday, August 23, 1946, at 10:00 o'clock a. m.

It Is Further Ordered that the Warden of the United States Penitentiary at Alcatraz, California, produce the appellant in open court on Friday, August 23, 1946, at 10:00 o'clock a. m.

It Is Further Ordered that the clerk of the District Court for the Northern District of California forthwith transmit to this Court the original files in the following causes:

No. 23268-W, Price vs. Johnston;
No. 23721-R, Price vs. Johnston;
No. 25040-S, Price vs. Johnston.

[fol. 42] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER VACATING SUBMISSION OF CAUSE—November 14, 1946

Good cause therefor appearing, It Is Ordered that the submission on August 23, 1946, of this cause for consideration and decision, be, and hereby is vacated and set aside.

(Denman, C. J., not participating.)

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ASSIGNING CAUSE FOR HEARING—November 14, 1946

Good cause therefor appearing, It Is Ordered that the above cause be, and hereby is assigned for hearing before the Court en banc at San Francisco, California, on Tuesday, December 10, 1946.

(Denman, C. J., not participating.)

[fol. 44] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR PERSONAL APPEARANCE—Filed November 29, 1946

To the Honorable, the Judges of the Above Entitled Court, En Banc:

If it may please this Honorable Court, now comes, Homer C. Price, the Appellant in the above entitled cause, and moves this honorable Court to issue an order directed to the appellee James A. Johnston, supra, directing said appellee to produce the appellant, before this Honorable Court on Tuesday, December 10, 1946, for the following reasons to wit:

That the appellant has on the aforesaid date, an appeal to re-argue, as said cause was argued by appellant, and counsel for appellee on August 23, 1946, and for reasons unknown to appellant, said order of submission on August 23, 1946, has been vacated and set aside, as of Thursday the fourteenth day of November, 1946:

This Honorable Court on November 14, 1946, further caused an order on its own motion, did re-assign said cause for hearing before the court en banc at San Francisco, [fol. 45] California, on Tuesday, December 10, 1946.

And due to the fact that appellant in this cause is acting as his own counsel, it is earnestly stressed that this Honorable Court issue the aforesaid order as provided by law:

Appearance personally is authorized by the act of: Title 28, sec. 394 (Judicial code, section 272) appearance personally or by counsel, "in all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts, respectively, are permitted to manage and conduct causes therein," (R. S. sec. 747: Mar. 3, 1911 C. 231 sec. 272, 36 stat. 1064).

Conclusion

Wherefore: Appellant prays that he may have this privilege, of appearance personally, in order that he may present, and argue his cause of appeal.

And appellant will ever pray.

Respectfully Submitted, Homer C. Price, Appellant, Propria Persona.

Dated by appellant November 27, 1946, Alcatraz, California.

[File endorsement omitted.]

[fol. 46] In United States Circuit Court of Appeals

[Title omitted]

Order Continuing Hearing—December 10, 1946

Ordered hearing continued until the further order of the Court.

[fol. 47] In United States Circuit Court of Appeals

[Title omitted]

Order Directing Filing of Opinions, and Denying Motion for Personal Appearance—January 6, 1947

Ordered that the typewritten opinion, concurring opinion and dissenting opinion this day rendered by this Court on motion of appellant for personal appearance be forthwith filed by the clerk.

Pursuant to the majority opinion and concurring opinion, It Is Ordered that the motion of appellant for a personal appearance to orally argue his appeal herein be, and hereby is denied.

[fol. 48] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11,334

HOMER C. PRICE, Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Appellee

UPON MOTION FOR PERSONAL APPEARANCE

Before Garrecht-Denman, Mathews, Stephens, Healy, Bone, and Orr, Circuit Judges

OPINION—Filed January 8, 1947

HEALY, Circuit Judge:

Appellant Price, who is an inmate of Alcatraz prison, sought release on habeas corpus and his petition was dismissed by the district court. He is not represented by counsel. As is usual in this type of case he has perfected his own appeal, and presumably with the aid of fellow inmates who have become proficient in such matters has supplied us with an elaborate typewritten brief and argument covering his points. He now moves for an order of the court commanding the warden to produce him on the date set for the hearing so that he may orally argue his appeal.

While not so denominated, the motion is nothing other than an application for a writ of habeas corpus. True, the purpose for which the writ is here sought is not one of the several purposes for which such writs might issue at common law, but nonetheless the end to be served is the same, namely, to have the body of the prisoner brought before the court. Because on several occasions in the past panels of this court, improvidently, we think, have issued like commands for the purpose specified in the motion, and more particularly because it has become common practice of

[fol. 49] prison inmates in the circuit to move for a like order on appeal of their causes, we have thought it best to announce our views on the subject in a formal opinion.

At common law several varieties of the writ of habeas corpus were recognized, each serving a specific purpose. The most common and important was the great writ referred to in Art. I, § 9, of the Constitution of the United States, the purpose of which is to inquire into the cause of the imprisonment of one claiming to be unlawfully restrained of his liberty.[1] As indicated in the footnote and in the authorities there cited, the several varieties of the writ were distinguished one from the other by the specific terms declaring the purpose to be served by each. Enough to say here that no species of the writ of habeas corpus known to the law was issuable for the purpose for which the writ is sought in this instance, namely, to enable a prisoner to argue his case in person.

As the basis of his application Price cites a federal statute (28 U. S. C. A. § 394) which provides: "In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."[2] This statute goes no farther than to affirm the ordinary right of a party to a cause, whether civil or criminal, to conduct his own case without intervention of counsel. It does not, as seems to be the argument, confer any power on the court, or imply in the court any duty other than that

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[1] This variety of the writ was called habeas corpus ad subjiciendum. Another variety is the writ of habeas corpus ad testificandum, the purpose of which is to bring into court one who is confined in order that he may testify in a cause on trial. A third variety, the writ of habeas corpus ad prosequendum, was issued to remove a prisoner in order to prosecute or try him for an offense in the jurisdiction where the crime was committed. There were other less well known varieties of the writ. For discussion of the several varieties and the purpose served by each, consult Ex parte Bollman, 4 Cranch 74, 95, 96; State v. Fabisinski, 111 Fla. 454, 152 So. 207; Black's Law Dictionary, Habeas Corpus.

[2] The statute is derived from § 35 of the Judiciary Act of 1789, 1 Stat. 92.

of permitting the party to do what the statute says he may [fol. 30] do. Nor does it insure the party against external happenings which may circumscribe the right or interfere with its exercise. Where one is imprisoned for felony he is by the very terms of his commitment required to be confined in prison for the period of his sentence. Of necessity he is disabled for the time being from exercising a myriad of rights, many of them of infinitely greater value than that of personally conducting a civil action to which he is or becomes a party. These deprivations are an inevitable and intended consequence of conviction for crime.

It has been suggested, though not by Price, that our Rule 22(1), providing that in this court the appellant "shall be entitled to open and conclude the argument of the case," affords grounds for the motion. The rule has no bearing on the point. It prescribes merely the order of argument. Even though we were in position to lift ourselves by our own bootstraps by the adoption of a rule, this one does not purport to add to our powers.

The thought is advanced, also, that authority for our issuance of the writ applied for is to be found in § 262 of the Judicial Code, 28 U. S. C. A. § 377, providing that "the Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Unless the statutory phrase "necessary for the exercise of their respective jurisdictions" is to be stripped of all meaning, the prescribed condition can not be said to be met. The case is already before us for final disposition, and no impediment of any sort confronts us. Oral argument is not thought prerequisite to decision, in fact is often dispensed with. Certainly oral argument by a party in the situation of appellant, as distinguished from argument by counsel who might be designated to represent him, can not "fairly be said to be reasonably necessary" to the exercise of our appellate jurisdiction. Adams v. United States, 317 U. S. 269, 274. Cf., also, Whitney v. Dick, 202 U. S. 132. In short, unless we substitute whim for necessity, and are further prepared to invent for the occasion a species of the writ unknown to the "usages and principles of law," we are obliged to hold that this statute affords no ground for the

motion. To grant it on the basis of the statute would constitute a palpable abuse or misuse of power.

[fol. 51] The motion, indeed, proceeds on an assumption quite different from that supplied by § 262 of the Judicial Code. The thought appears to be, not that the court needs the party's help, but that the statutory right of the party to conduct his own case implies a corresponding duty on the part of the court to compel his production; otherwise due process of law is not afforded. We have already discussed this doctrine.[3]

Questions of authority aside, it is but just to observe that despite his detention Price has been able substantially to take advantage of the statute he invokes, that is to say, he has in fact managed and conducted his own appeal in all essential particulars, including the argument of it, albeit the argument is in writing. We may add that in exceptional cases of this type, where questions of complexity are raised and it is believed that counsel would be helpful, we have followed the policy of appointing counsel to represent the petitioner; and the same policy is pursued in the district courts.[4] Not a few cases of this exceptional character have been presented by court-appointed counsel throughout. Whether this case is of that exceptional character it is for immediate purposes unnecessary to inquire.

Nor should we overlook the consequences of an easy assumption of the power to order the wardens to bring prisoners into court for the mere purpose of oral argument. There are in the Ninth Circuit, besides the two federal prisons, the penitentiaries of the seven states and two territories comprising the circuit. The inmates of all these far-flung institutions, state and federal, may and do resort to the federal courts for inquiry into the legality of their detention. In recent years the dockets of the courts in several of the districts, and our own calendar, have become crowded with these cases, all of which receive earnest attention. The practice of the district courts of issuing an order

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[3] Compare in this connection, Schwab v. Berggren, 143 U. S. 442; Bell v. United States, 5 Cir., 129 F. 2d 290; Barber v. United States, 4 Cir., 142 F. 2d 805.

[4] Habeas corpus is a civil proceeding, and the petitioner is not, as in criminal cases, entitled to have counsel appointed as a matter of right. Ex Parte Tom Tong, 108 U. S. 556; Dorsey v. Gill, App. D. C., 148 F. 2d 857, 877.

to show cause upon the filing of a petition for the writ has [fol. 52] been productive of a much needed saving of time and effort on the part of courts and prison officials, for in many if not most of the cases it turns out that no disputed issue of fact, but only issues of law, emerge. If the legal questions are decided adversely to the petitioner, the writ does not issue at any stage of the proceeding. Cf. Walker v. Johnston, 312 U. S. 275. But if the present motion were to be held well grounded, not only this court but the district courts would virtually be compelled to order the prisoner brought in in every instance merely that he may conduct his case in person. They could not in fairness make fish of one applicant and fowl of the other. Thus this spurious variant in the field of habeas corpus would outrank in urgency the great constitutional writ itself. One need not be a prophet to foresee the widespread abuse of the writ that would ensue, not to mention the items of fruitless burden and expense. To the legitimate hope of release by legal means would be added inducements not so legitimate; for temporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls.

The motion is denied.

OPINION

STEPHENS, Circuit Judge, concurring in the result:

I am of the opinion that this court possesses the power to aid its appellate duty by exercising its discretion in granting or denying the motion. In the exercise of that power I vote to deny the motion.

DISSENTING OPINION

Dissent of DENMAN, Circuit Judge, in which Judge Orr Concurs:

This circuit court of appeals has rendered a decision on a federal question in conflict with the applicable decisions of the Supreme Court in Adams v. United States, 317 U. S. 269, 275, and in Whitney v. Dick, 202 U. S. 132, 136-137, discussed infra. They hold contra to the court's opinion that in "special circumstances" the circuit court of appeals has the power to require the warden to bring the body of his

opposing litigant before that court to have him there present "in the interest of justice." Cf. Supreme Court Rule 38.

[fol. 53] This dissent is to the denial of the existence of any *power* in this court to compel a warden to produce the body of his opposing litigant where the warden desires to prevent his opponent from arguing his appeal. We are here discussing the court's *power* in the case of such a warden.[1] That is to say, that if a skilled member of the bar, sentenced to be hanged, seeks to argue his appeal we have no *power* to compel a warden to produce him for that purpose in a habeas corpus case in which the balance is between his life and his death—and this though the decision of the appeal may be in a hair's balance in the minds of the judges composing the court.

What seems the fundamental error in the majority's approach is the treatment of a habeas corpus appeal, involving life or death to the appellant or the deprivation of his liberty, as an ordinary civil case. This is shown by footnote 4 of the opinion and in the sentence speaking of what one so convicted is deprived of by his imprisonment, as follows:

> "Of necessity he is disabled for the time being from exercising a myriad of rights, many of them of infinitely greater value than that of personally conducting a *civil* action to which he is or becomes a party. These deprivations are an *inevitable and intended consequence* of conviction for crime." (Emphasis supplied.)

Habeas corpus proceedings are civil in nature but are extraordinarily different from all other civil proceedings. First, as stated, the prisoner litigant is in the custody of his opposing litigant, the warden. Second, it is so concerned with the sentence depriving him of life or of liberty that specific provision is made for it in Article I, Section 9, of the Constitution.

Where, as in the federal criminal procedure, an appeal is provided, it is a denial of due process to the appellant to deny him the right "to be heard . . . according to the established methods of procedure" at the appellate hearing.

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[1] The discussion has no application to the able and conscientious Warden Johnston.

Frank v. Mangum, 237 U. S. 309, 326. Cf. Boykin v. Huff, 121 F. 2d 863, 873 (C. A. D. C.).

[fol. 54] It seems absurd to say that in a habeas corpus proceeding where his life or liberty is equally at stake, we hold that we have no power to bring such an appellant before us to argue his appeal in accordance with our "established method of procedure" because habeas corpus is a civil proceeding.[2] In this court the established method of procedure is that appellant "shall be entitled" to open and close an "oral" argument.[3] Congress in 28 U. S. C. A. 394 made it an "established method of procedure" that all litigants "in all courts of the United States . . . may manage their own causes personally." It is not necessary that an appellant shall appear personally to confer jurisdiction on the court. That jurisdiction was obtained for Price had already filed an appeal from the judgment of conviction. Schwab v. Berggren, 143 U. S. 442, 449. He has prosecuted his appeal in the briefs before us. This dissent is not concerned with the further question whether the Act of Congress instead of constitutional due process confers on the appellant the right in all cases to appear and manage his case. As stated, it is from the court's denial of the power to bring any appellant here to argue his appeal, even if we deem his argument will aid us in its disposition—an argument we also deem a part of our "established method of procedure" for all other appellants.

That federal appellate courts have power to issue such a writ in all cases "in the interest of justice," not to secure jurisdiction but to "aid" in its exercise "in an appeal over which the court has jurisdiction" is stated by the Supreme Court in Adams v. United States, 317 U. S. 269. In that case, in holding at page 275 that the writ was "not

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[2] The denial of the right to be represented by counsel is a violation of due process in an ordinary civil suit to quiet title. Roberts v. Anderson, 66 F. 2d 874, 876 (CCA 10).

[3] Rule 22 (1) provides:

"1. The appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument."

improvidently entertained" by the circuit court of appeals, the Supreme Court states, at pages 274 and 276,

> [fol. 55] "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an *aid* to an appeal over which the court has jurisdiction *may fairly be said to be reasonably necessary in the interest of justice,* the writ of habeas corpus is available to a circuit court of appeals. [Emphasis supplied.]
>
> . . . [The] procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.'"

The majority in its quotation of the words "fairly be said to be reasonably necessary" omits the succeeding words "in the interest of justice." They seem significant.

The Supreme Court had held similarly in Whitney v. Dick, 202 U. S. 132, also cited in the court's opinion. There, at pages 136 and 137, in discussing the writ of habeas corpus which is to be "agreeable to the principles and usages of law" and which may be "necessary for the exercise" of an appellate jurisdiction, the Court says the writ is one issuable both "when necessary *for* and *in aid of* the exercise of a jurisdiction already *otherwise* obtained." (Emphasis supplied.)

In the instant appeal "jurisdiction [was] already otherwise obtained." The majority opinion errs when it states that the writ can not issue when "the case is already before us for final disposition and no impediment of any sort confronts us."

It is thus seen in the above described situation of the condemned lawyer we have the *power* to issue the writ. The Supreme Court so holds. Whether we will exercise the power in any case is dependent upon whether his presence is "in the interest of justice."

There is nothing contrary to this in the earlier case of Schwab v. Berggren, 143 U. S. 442, cited in this court's opinion. There, at page 449, the Supreme Court states

> ". . . We do not mean to say that the appellate court may not, under some circumstances, require his

personal presence; but only that his presence is not essential to its jurisdiction to proceed with the case."

[fol. 56] The majority opinion properly states that no such writ of habeas corpus existed in the appellate court at common law. Yet the Supreme Court holds that, in cases where our jurisdiction is already established, it is a "dry formalism" to deny that Section 14 of the Judiciary Act, now 28 U. S. C. 377, gives us the power to issue the writ whenever it is necessary "in the interest of justice."

The argument of hardship of the last paragraph of the majority opinion and its statement that "They [the courts] could not in fairness make fish of one applicant and fowl of the other" are a confession of motivation but no avoidance of the Supreme Court's decision in Adams v. United States, supra. There the power to issue the writ to bring the prisoner before the appellate court is confined to "exceptional cases." The majority's opinion denies the power to issue it even in the exceptional case where a skilled lawyer may be of real aid to the court in resolving a doubtful question of law upon which his life depends.

For this Ninth Circuit, the Supreme Court's statement that

> "'In special circumstaces, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of habeas corpus is available to a circuit court of appeals"

has added to it the words

> "except where the court thinks the prisoner's management of his case before the court is in the interest of justice."

It well may be asked, "For what other purpose could an appellate court have the power to bring the body of an appellant before it save to enable him to assist the court in his management of his case while there personally present?

The motion for the order should not have been denied because of an absence of our power to grant it.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS

Before the Court en banc (Garrecht, Denman, Mathews, Stephens, Healy, Bone and Orr, Circuit Judges)

[Title omitted]

ORDER OF SUBMISSION—February 7, 1947

Ordered appeal herein submitted to the Court on behalf of appellant on briefs filed, and argued by Mr. Joseph Karesh, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINIONS AND FILING AND RECORDING OF DECREE—May 5, 1947

Ordered that the typewritten opinion and dissenting opinions this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[fol. 59] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11,334

HOMER C. PRICE, Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Appellee

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before Garrecht, Denman, Mathews, Stephens, Healy, Bone, and Orr, Circuit Judges

OPINION—Filed May 5, 1947

HEALY, Circuit Judge:

This appeal challenges the discretionary power of the court to deny a habeas corpus petition because of an abusive

use of the privilege of the writ through the filing of successive petitions presenting seriatim grounds at all times within the knowledge of the applicant. Panels of this court have repeatedly affirmed the existence of such authority,[1] but in view of the importance of the question and the possible bearing upon it of recent Supreme Court decisions the appeal has been set down for hearing before the full bench.

Appellant is serving a sentence of 65 years on a general verdict of guilty under an indictment charging violations of 12 U. S. C. A. §§ 588b(a) and (b) and 588c, relating to bank robbery and assault and kidnapping incidental thereto. The present is his fourth petition for the writ, all of them having been presented to the United States district court [fol. 60] for the northern district of California.[2] On appeal from the first refusal to discharge we affirmed the judgment, Price v. Johnston, 125 F. 2d 806, cert. den. 316 U. S. 677, and a like result was reached on appeal in the second proceeding, Price v. Johnston, 144 F. 2d 260. No appeal was taken from the denial of the third petition.

The instant petition, as originally filed, raised questions concerning the validity of the sentence and the giving of an instruction commenting on evidence of the commission of a collateral offense. Substantially the same questions, among others, had been raised in the district court in the proceeding on the second application.[3] Accordingly, if this were all, the judgment of dismissal would appropriately be subject to affirmance on the basis of the court's refusal to discharge in the second proceeding. Ex Parte Hawk, 321 U. S. 114, 118; Salinger v. Loisel, 265 U. S. 224, 230-232.[4] How-

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[1] Swihart v. Johnston, 150 F. 2d 721; Garrison v. Johnston, 151 F. 2d 1010; Wilson v. Johnston, 154 F. 2d 111, cert. den. 328 U. S. 872.

[2] The first petition was filed in June 1940, the second in September 1942, and the third in August 1945.

[3] These points appear not to have been pressed on the appeal in that proceeding, and they are patently without merit.

[4] In Salinger v. Loisel, after noting that the common law doctrine of res judicata does not extend to a decision on habeas corpus refusing to discharge a prisoner, the Court said that a prior refusal is not without bearing or weight

ever, by way of amendment to his petition the appellant interposed a wholly new ground for discharge, namely, "that the government knowingly employed false testimony" on the trial, to obtain conviction." The specific circumstances of this claim are not further developed in the peti- [fol. 61] tion or in the traverse to the warden's return,[5] but in his brief here the appellant has enlarged upon the point by stating that the United States attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first." Since the general allegation may be supported by specific proof we treat this statement as though it had been incorporated in the petition, Hawk v. Olson, 326 U. S. 271, 273. So construing the petition, it remains to determine whether the court erred in refusing to inquire into the claim of the knowing employment of false testi-

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when a later application is being considered. "'In early times,' said the Court, 'when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed . . .'" [pp. 230-231.] In the Salinger case there had been a prior refusal to discharge by a court of coordinate jurisdiction and an affirmance of the judgment by the circuit court of appeals. The Supreme Court remarked that had the district court disposed of the immediate application on that ground "its discretion would have been well exercised and we should sustain its action without saying more." [p. 232.]

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[5] The court below issued an order to show cause upon the filing of the petition, and after the warden had made his return setting up the earlier proceedings, the petitioner filed a traverse. The court thereupon, without having issued the writ, discharged the show cause order and dismissed the petition.

mony. Cf. Mooney v. Holohan, 294 U. S. 103, 112. The court's refusal to inquire was concededly predicated on our holding in Swihart v. Johnston, supra [note 1], and cases therein cited.

The records in these several proceedings disclose that throughout his trial appellant was represented by counsel of his own choosing. And since he was himself present at all times he could hardly have been unaware of the described incident or of its implications, nor does he make any such claim. On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now. Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions.

The decision in Swihart v. Johnston, holding that such reservation of grounds amounts to an abusive use of the writ, announced no novel doctrine. That case and those which came after it proceeded upon the authority of Salinger v. Loisel, supra, and Wong Doo v. United States, 265 U. S. 239. In these latter decisions, handed down simultaneously, the Court elaborately considered certain principles applicable to habeas corpus. The Wong Doo case, involving a petition by a Chinese in custody under a deporta- [fol. 62] tion order, is closely analogous to the present. The applicant had presented an earlier petition in which the validity of the order was assailed on two grounds, one of which was that the hearing on which the deportation order rested was not adequate or fair but essentially arbitrary. In the hearing the petitioner had offered no proof in support of this ground, and the district court did not rule upon it, holding merely that the other ground asserted was not good. In his second petition the applicant relied entirely on the ground earlier asserted but not pressed, namely, that the hearing had been unfair. The district court held that the doctrine of res judicata applied and remanded the petitioner, the circuit court of appeals affirming. The Supreme Court held the doctrine inapplicable but nevertheless affirmed the judgment, saying that the situation was plainly one where "according to a sound judicial discretion, controlling weight must have been given to the prior refusal." It observed that the petitioner had full opportunity to offer proof of the ground in the hearing on his first petition and that good faith required that he produce the proof then. Said the Court: "To reserve the proof for use in attempt-

ing to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time."

In none of the more recent decisions of the Supreme Court are the principles announced in Salinger v. Loisel or Wong Doo v. United States, supra, overruled or modified. Waley v. Johnston, 316 U. S. 101, and Hawk v. Olson, 326 U. S. 271, reaffirm the rule there stated that the doctrine of res judicata is not applicable in habeas corpus cases, but neither decision casts doubt upon the power of the court, in the exercise of a sound discretion, to decline to consider repeated petitions where it appears that the privilege of the writ is being abused. Practical considerations as well as reason and justice support the exercise of such power. In an earlier opinion in the present proceeding, Price v. Johnston, 159 F. 2d 234, we noted the tendency of prison inmates in this circuit to multiply petitions, with the result that unnecessary and increasingly heavy burdens are thrown on the courts in districts where federal penitentiaries are located; and in Dorsey v. Gill, 148 F. 2d 857, [fol. 63] the court of appeals of the District of Columbia has amassed figures evidencing the occurrence of a like phenomenon in its jurisdiction. Our opinion last above cited comments on the dubious nature of the objectives that seem in many instances to inspire these recurring applications for the writ.

The command of the statute, 28 U. S. C. A. § 461, is that the courts and judges make such disposition of habeas corpus petitions "as law and justice require." A petitioner is entitled to an opportunity to prove his claim of unlawful imprisonment, Hawk v. Olson, supra, p. 279, but good faith requires that he make fair use of the opportunity afforded. Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ. Conversely, no matter if there have been a multiplicity of petitions, grounds newly asserted and seemingly valid must be inquired into if circumstances appear or are fairly shown to excuse the prior failure to assert them. It should be unnecessary to

add that even in the absence of such a showing the court may issue the writ and proceed to inquire if in a particular case it is thought that the ends of justice dictate that course. We are not here concerned with a compulsive principle analogous to res judicata, nor with some empty formula to be applied without reflection or as a matter of course. We are speaking rather of a discretionary power resting in the conscience of the judge, to be exercised in light of the circumstances of the particular case and on grounds which square with reason and justice.

In this instance there was no abuse of discretion in the dismissal of the petition.

Judgment affirmed.

DISSENTING OPINION

DENMAN, Circuit Judge, dissenting:

Under the pressure of the large number of habeas corpus petitions filed in this circuit, this decision establishes a principle hamstringing a wrongfully imprisoned man. It plainly makes it the law for this circuit that a man convicted on perjured testimony procured by a United States attor- [fol. 64] ney, but who does not discover the facts until after he has filed a petition for the writ on another ground, must serve his sentence—here for 65 years.[1]

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[1] *An ex parte hearing, in effect, on a habeas corpus appeal.* The declared importance of this case is apparent, both as to the principle established and to Price under a 65-year sentence. Yet, regardless of this importance, neither Price, suing forma pauperis, nor any attorney appointed for him, participated in the hearing en banc. This is despite our Rule 22 (1), which has the force of law, that "the appellant shall be entitled to open and conclude the argument of his case."

In this court's opinion, filed on January 8, 1947, to which Judge Orr and the writer dissented, it is held, ignoring our rule and the underlying justice of having Price or some attorney in his behalf participate in the hearing, that we have not the *power* to compel the Warden to produce him so he could participate in the hearing and he was denied his petition for a writ of habeas corpus for that purpose.

In the absence of such power it became the duty of the Warden to determine whether he would obtain what, in ef-

In so narrowing the relief afforded by the writ, this court is but following a continued line of decisions since the increase of such petitions in this court, in which the Supreme Court recently has reversed us. They are: Waley v. Johnston, 316 U. S. 101. Robinson v. Johnston, 316 U. S. 649; Holiday v. Johnston, 313 U. S. 342; Walker v. Johnston, 312 U. S. 275.

The ground of the petition of the appellant, kept from appearing before us, is properly stated in the court's opinion. It is, as there stated, that the prosecuting attorney "knowingly employed false testimony on the trial, to obtain the conviction" and that this false testimony was and was procured in the following manner, namely that the prosecuting attorney "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that [fol. 65] he did not see the pistols, and described them, when he could not do so at first."

The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney *could only have been learned after conviction and after the convicted man was in the penitentiary.*[2]

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fect, is an ex parte hearing, by holding from the court the body of his opposing litigant, or would afford Price due process by bringing him into court.

At the hearing we asked the Warden's attorney why Price was not present. He stated that the Warden had advised him that in all habeas corpus cases he was opposed to having the petitioner present at such hearings. What was said in our dissent to the opinion of January 8, 1947, applies *a fortiori* to the case as it developed at the hearing.

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[2] It is only by such an allegation of the prosecuting attorney's wrongful acts that the case is brought within Mooney v. Holohan, 294 U. S. 103, 112.

This fair statement of the appellant's contention is followed by the court's complete and very damaging *non sequitur* with no support in any fact stated in the opinion or in the record here. It is that "On the fact of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now."

This is immediately followed by another *non sequitur* of the last quoted sentence. It is "Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions."

The appellant, denied hearing here, well may meditate bitterly in his cell: "Why pertinent that I did not give reason or excuse for stating the facts of the subornation of the testimony in a prior petition, if the record clearly shows that I knew about it when the testimony was changed and could have had my attorney prove it at the trial?"

For all we know, Price was not apprised of such action of the prosecuting attorney until long after the filing of any prior petition. It is on this that the court, in confusing terms, makes its constricting ruling. It is that "Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ."

[fol. 66] This confusing because the onus *probandi* concerns *facts* not the *satisfactions of a court.* The true statement of the court's criterion on the facts in issue here is "Where there have been repeated petitions with an apparent husbanding of grounds, the applicant has the burden of showing that a ground newly asserted was in fact previously unavailable or unknown to him."

That is to say, there is a presumption against the petitioner here, not an attorney, that if the time he acquired knowledge of the facts constituting the wrong is not stated in a second petition, he is deemed to have known them at the time he filed the first petition. There is no such presumption in any civil or criminal proceeding of which I have knowledge.

Certainly the creation and application of such a presumption against a non-lawyer petitioner is not such a disposition "as law and justice require" as provided in 28 U.S.C. 461.

Having so ruled, this court then denies Price his right to go forward in the district court and establish his "burden of showing" such facts. It then sustains the dismissal of

the petition without permitting its amendment to show when Price acquired such knowledge of the alleged subornation of perjury leading to his conviction.

True, the multiplicity of petitions in the District Court for the Northern District of California from ingenious and sometimes perjuring pleaders in Alcatraz prison may cause its judges to have a justifiable suspicion that this petition may be "just another."[3] However, that court well may protect itself by requiring an amendment to the petition stating when the knowledge of the facts was secured. It also could protect itself by a rule requiring that such petitions should state when the facts pleaded came to the knowledge of the petitioner.

[fol. 67] Here the absent petitioner, not a lawyer, pleading in propria personam and in forma pauperis, has his petition dismissed with neither the right to sustain his "burden of showing" nor with the right to amend. A similar situation is where a sentence adjudged is invalid on its face but the imprisoned man, not a lawyer, does not realize it. He files a petition on another ground. Under the instant decision he must remain imprisoned because in a second petition setting forth the judgment he has not stated that he did not realize its invalidity until after the first petition was filed.

Nothing in Wong Doo v. United States, 265 U. S. 239 warrants such a denial of justice. In the Wong Doo case the ground of the second petition was set up in a prior petition and the Supreme Court found, at page 241, that the facts supporting it were "accessible all the time" to Wong Doo. Here the ground was not asserted in a prior petition and there is nothing in the record to show that at the prior

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[3] The Supreme Court reversed this court for sustaining the dismissal of a petition for the writ, though stating that it is "True, petitioner's allegations in the circumstances of this case may tax credulity. But in view of their specific nature, their lack of any necessary relation to the other threats alleged, and the failure of respondent to deny or to account for his failure to deny them specifically, we cannot say that the issue was not one calling for a hearing within the principles laid down in Walker v. Johnston, [312 U. S. 275] . . ." Waley v. Johnston, 316 U. S. 101, 104. (Emphasis supplied.)

time any of the facts regarding the prosecuting attorney's wrongful action were then known to Price, confined in a federal penitentiary.

Nor is there anything in the dictum in Salinger v. Loisel, 265 U. S. 224, supporting such a treatment of a petition which for the first time sets forth a justifiable ground for a release of the prisoner. There Salinger's later petition merely repeated the ground of a prior one which, on appeal, had been held not valid. In that case, however, despite the prior decision of the appellate court, the Supreme Court *did consider* the merits and *did not base its decision upon the decision on the prior petition.*

The companion cases of Wong Doo and Salinger were decided in 1924. In the 23 years since, the Supreme Court decisions have made clear the limitations of these decisions—limitations well to be considered, though, as seen, these two cases are not applicable here.

Though ignored by this court, Price's brief points out that in the recent case of Hawk v. Olson, 326 U. S. 271, the Supreme Court upheld Hawk's petition though it states at page 272, it had denied two petitions for certiorari on Hawk's two other habeas corpus proceedings in which the *same* ground was asserted. *A fortiori* should we consider a petition stating a ground never before stated in any petition.

[fol. 68] So also the court's opinion ignores the case of Waley v. Johnston, 316 U. S. 101, 105, where the Salinger case is emphasized for its holding that "the principle of res judicata does not apply to a decision on habeas corpus." There this court was reversed and Waley's petition sustained, the opinion stating

> "The principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner, Salinger v. Loisel, 265 U. S. 224. It does not appear that on petitioner's earlier application for a writ of coram nobis the same issue was raised as that now presented. The earlier application was denied for insufficiency upon its face and without a hearing. There is thus no basis for the holding of the District Court that the denial is res judicata of the present petition."

Waley, of course, had full knowledge of the threats made to him when he brought his earlier proceeding. The fact

that he reserved the contention for the later proceeding did not prevent its consideration by the Supreme Court.

Likewise in Robinson v. Johnston, 118 F. 2d 98, 101 (C.C.A 9), Healy, C. J., dissenting, this court refused to consider Robinson's petition for a writ of habeas corpus based upon his claimed insanity, because the same claim had been urged in a prior coram nobis proceeding and decided against him, he having first offered and then withdrawn the proof of his mental condition. We were reversed, 316 U. S. 649, on the authority of Waley v. Johnston, supra.

In the case Cochran v. Amerine, 113 P. 2d 1048, a habeas corpus proceeding, the Kansas supreme court states, at page 1049, that Cochran unsuccessfully had filed four petitions, two in the federal court and two in the state courts. Despite the fact that the Kansas supreme court decision was on an appeal from the fifth denial of the writ, the United States Supreme Court granted certiorari, sustained Cochran's contention and reversed the decision. Cochran v. Kansas, 316 U. S. 255.

Nor does the court's opinion consider this court's decision in Johnston v. Wright, 137 F. 2d 914, 915 (CCA 9), where, in sustaining Wright's contention, we state that the identical contention there made by Wright had been con- [fol. 69] sidered in three district court proceedings and disposed of adversely to him before it was decided favorably to him in a fourth petition to a circuit judge.

Surely it is a strange divergence from Johnston v. Wright where we ordered Wright *released* on his fourth petition for the writ, each asserting the *same* grounds, now to *refuse to consider* Price's petition on a ground *never before asserted.* Stranger yet to do so *sub silentio.*

Though not presented here, it is still a serious question whether an innocent man must be imprisoned or hung where his first petition asserts, unsuccessfully, what he considers his strongest claim and consciously reserves for a second petition another ground which, if considered, would free him. For instance, should a man imprisoned on a sentence for life, invalid on its face, spend the remainder of his days in the penitentiary if he "had access to" knowledge of its invalidity and nevertheless filed a first petition on another ground? Would it be the exercise of a "sound" or any permissible discretion for the district court to

dismiss the petition on the grounds stated in the court's instant opinion? If it be beyond the court's discretion so to keep him imprisoned where the judgment is void on its face, does such discretion arise because he has been wrongfully convicted by perjury procured by the prosecution?

The bad situation arising from a burdensome infliction on some of our district courts of a flood of unwarranted petitions should find relief through Congress. Where the petition is perjured there should be a criminal prosecution. With the fascistic tendencies apparent in our American life, the remedy is not in undermining any of our civil liberties, particularly the right to habeas corpus, by bad law.

It may be argued that Price now may file a new petition alleging the fact that, while he knew at the trial of the change of testimony, he did not learn until after his last proceeding was filed that the prosecuting attorney had suborned the perjury to procure his conviction. Thus at the end of another two years in prison, while the federal courts are giving the "summary" disposition of a writ of habeas corpus required by 28 U.S.C.A. 461, Price may be released.

[fol. 70] The absurdity of the argument is patent. Under the rule here established, such a new petition must be denied because the fact of the late acquisition of the knowledge of such subornation was known to Price at the time of the filing of the petition we now dismiss.

The district court should be reversed because it *at least* erred in that it neither (a) permitted Price to go forward and prove that not until after he had filed his first petition had he learned the facts alleged as to the gross misconduct of the prosecuting officers, nor (b) permitted him to amend his petition to show when such knowledge was acquired.

Dissenting Opinion

Stephens, dissenting:

I am unable to subscribe to the majority opinion, because I think by it the holding in Swihart v. Johnston, 150 Fed. 2d 741, is extended beyond its true limitations.

In the Swihart case we held that *controlling weight* in the *consideration* of a petition for the writ of habeas corpus may be given the fact that a former petition, based upon the same cause, had been filed, heard and decided. We did

not hold that the court could refuse to consider a petition for the writ *merely* because a former petition had been adjudicated. No case, so far as I am aware, has ever gone further than the expression we used in the cited case, to-wit, "*One of the matters* which may be considered and given controlling weight is a prior refusal to discharge on a like petition." This expression does not mean and should never be judicially extended to mean that because one petition had been heard and denied, a second petition, based upon different allegations, could or should be dismissed as a matter of course.

No more is stated in the cited case than that *in the consideration* of the second petition the instance of, and the facts connected with, the first petition may turn the scales against the petitioner. And the instance of, and the facts connected with, the first petition, I apprehend, would be that the hearing upon the first petition had been a thorough and adequate trial upon issues again presented in the second petition or that the petitioner was perpetrating a fraud upon the court.

[fol. 71] In the instant case the cause alleged by petitioner is entirely different from any heretofore alleged. If what petitioner now alleges is true, he was convicted upon perjured testimony suborned by the prosecuting attorney. It is entirely unlikely that such a monstrous charge has any truth in it, but such improbability does not authorize the court to brush it aside. Any number of circumstances may have prevented this new and different issue from being set up in the former petitions, and it must not be overlooked that one in prison and longing for freedom is not always in a mental condition to act perfectly or even free to act as and when he desires to do so. It may be petitioner believed that the reasons he gave for his release in the former petitions were entirely sufficient and that he would never be put to the difficult task of proving the charges of the misconduct he now charges to the prosecuting officer. It may be that he has but recently obtained information which in his opinion will prove his charges. The possibilities are endless, and they should not be denied judicial investigation because all of them seem improbable.

It will be a very serious blow to the great writ if it is ever authoritatively decreed that one deprived of his liberty has but one shot for his freedom. This one shot must have

everything; missing anything, and the legal right to show the injustice and illegality of the imprisonment is gone forever. The impact of such a holding cannot be exaggerated. A court should take steps to be sure that "an abusive use of habeas corpus" is present before it rules against the entertainment of the petition, remembering at all times that the basis of the writ is a right and not a privilege. Until Congress, after a thorough consideration of the subject, places a limitation upon the right to the writ of habeas corpus, courts should not decree such limitation.

It is my considered opinion that the pronouncement, without a hearing, of the judgment of dismissal in the instant case constitutes an abuse of discretion as a matter of law.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11334

HOMER C. PRICE, Appellant

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Appellee

JUDGMENT—Filed and entered May 5, 1947

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME

Upon consideration of the application of the petitioner,

It is ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 6th, 1947.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of February, 1947.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 23, 1947

On consideration of the motion for leave to proceed further herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 76] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 23, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.